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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

THE PEOPLE

Plaintiff and Respondent,

v.

JOSE A. GALDAMEZ

Defendant and Appellant.

B234993

(Los Angeles County
Super. Ct. No. BA370565)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Judith Champagne, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J.
Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose A. Galdamez was convicted of committing a lewd or lascivious act with a child who is under 14 years of age. He appeals the trial court's judgment on two grounds. Appellant contends the trial court erroneously excluded certain evidence purportedly showing the child's mother was motivated to make false allegations against him. He also argues the judgment must be reversed because of prosecutorial misconduct. We reject both arguments and affirm the judgment.

SUMMARY OF FACTS

Appellant began dating Nancy O. in July 2009. A month later the couple moved into an apartment together. In December 2009, Nancy O.'s seven-year old daughter, Adriana C., immigrated to the United States from Guatemala and moved in with them.

On March 2, 2010,¹ appellant drove Adriana from her school to their apartment. Adriana and appellant were alone in the apartment because Nancy O. was working. At some point, appellant went to take a nap on his bed. What happened next was vigorously disputed at trial and lies at the heart of this case.

Adriana claims that she approached appellant and asked him to put his mouth on her breast. She had seen this conduct on television in Guatemala and was curious about it. Appellant then kissed and sucked her bare left breast. Adriana also contends that appellant removed her skirt and panties and "massaged" his penis on her vagina.²

¹ Appellant claims the incident occurred on February 26, 2010.

² Adriana's pre-trial statements to a social worker, nurse, and police officers regarding appellant's alleged touching of her vagina changed a few times. She initially stated that appellant placed his pinky finger on her vagina. One police officer reported that Adriana indicated appellant's finger had been "inserted" in her vagina, though he acknowledged Adriana did not use that word. Appellant impeached Adriana's testimony at trial with Adriana's previous inconsistent statements.

Appellant tells a different story. He contends when he woke up he found Adriana's breast "in" or "against" his mouth.³ He then pushed Adriana away and reprimanded her. Appellant also denies ever touching Adriana's vagina.

After the incident, appellant and Adriana went to Nancy O.'s workplace in his vehicle and brought her back home. Appellant did not immediately inform Nancy O. about the incident.

Shortly after they arrived at the apartment, Adriana called her mother into the bathroom to help her take tags off of new pajamas. While Adriana was changing, Nancy O. noticed a red mark around the nipple of Adriana's left breast that looked like a hickey. When Nancy O. asked what caused the mark, Adriana first claimed she was hit by a ball. Upon further inquiry, Adriana said that she caused the mark herself with her mouth. Finally, Adriana admitted that appellant caused the mark.

Nancy O. emerged from the bathroom and approached appellant. Before she said anything, appellant stated, "I didn't do anything." Appellant "changed color" when he said this. Nancy O. had Adriana show the mark on her breast to appellant. He responded by saying that maybe the soap Adriana was using caused the mark.

At some point after the incident appellant stopped living in the apartment he shared with Nancy O. and Adriana. Appellant contends he moved out on the day after the incident. Nancy O. contends appellant left the apartment on March 5, 2010. It is undisputed that appellant moved out of the apartment before Nancy O. reported his alleged molestation of Adriana to the police.

³ In a secretly recorded telephone call with Nancy O., appellant stated: "I fell asleep but I don't remember having done anything. All I remember, [is] that she was next to me and . . . she was with her, uh, breast uncovered and it was in my mouth. . . ." At trial, appellant testified that Adriana's breast was "against" his mouth. Although he repeatedly denied that Adriana's breast was "in" his mouth, he answered several questions indicating otherwise. For example, when the prosecutor asked appellant whether he was "responsible" for Adriana's "breast being in his mouth," appellant answered: "It was in my mouth. I would say, no, she is not responsible. She is just a kid."

Nancy O. did not report the incident to anyone until March 8, 2010. On that date, she informed an employee of Adriana's school about it. This started a series of events which led to appellant's prosecution. Two police officers came to Nancy O.'s home and interviewed her, Adriana and appellant. A social worker from the Los Angeles County Department of Children and Family Services began an investigation. Adriana was examined at a rape treatment center. Nancy O. placed a "pretext" call to appellant regarding the incident, which was recorded by the police. Finally, with his attorney present, appellant gave a recorded statement to a police officer at a police station. At the end of this interview, appellant was arrested. The People began their prosecution shortly afterwards.

The People's amended information charged appellant with two counts of violating Penal Code section 288, subdivision (a),⁴ the first relating to appellant's alleged kissing and sucking of Adriana's breast and the second relating to appellant's alleged touching of Adriana's vagina with his penis. The information also set forth a special allegation pursuant to Penal Code section 1203.066, subdivision (a)(8) on the ground that appellant had "substantial sexual conduct" with Adriana.

The trial court held a jury trial on the amended information. The jury returned a verdict of guilty on count 1 but could not reach a verdict on count 2. The trial court thus declared a mistrial on the second count and dismissed the special allegation.

The court sentenced appellant to three years in state prison less time for good behavior and time served. Appellant filed a timely notice of appeal.

⁴ Penal Code section 288, subdivision (a) states "any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony"

DISCUSSION

1. *The Trial Court's Exclusion of Evidence*

a. *Appellant's Contentions*

One of appellant's principal arguments at trial was that Nancy O. had a motive to assert false allegations against appellant and to cause her daughter Adriana to do the same. Specifically, appellant argued that Nancy O. sought revenge against appellant because he had decided to end their relationship and withdraw his financial support for her and her daughter.

Appellant was allowed to present evidence regarding Nancy O.'s alleged financial reliance on him. He testified, for example, that he paid for the rent and utilities for their joint apartment, and that he earned about \$850 a week from his two jobs while she earned less than \$500 a week from her two jobs. Appellant also presented evidence that he moved out of the apartment he shared with Nancy O. before she contacted the police.

Appellant contends, however, that the trial court inappropriately limited the evidence regarding Nancy O.'s alleged motive of revenge. In particular, he argues the trial court erroneously excluded evidence showing that before Nancy O. reported the alleged molestation to the authorities, "appellant was already on the verge of withdrawing [his financial] support and involved with another woman"

b. *The Trial Court's Exclusion of Evidence*

In his briefs, appellant does not describe in detail the trial court rulings he contends were erroneous. Before we can analyze whether the trial court erroneously excluded evidence, we must review the rulings themselves.

(i) *Appellant's Statements Regarding Statements By His Former Girlfriend*

During the trial the People played an audiotape for the jury of Officer Hector Madrigal's pre-trial interview of appellant regarding his alleged molestation of Adriana. A redacted transcript of the interview was also given to the jury. Subsequently, outside the presence of the jury, the court heard arguments from lawyers representing appellant and the People regarding whether portions of pages 34 and 35 of the transcript should be

redacted. Unfortunately, the record does not contain an un-redacted transcript, and thus we do not know the exact contents of the disputed testimony. It appears from the attorneys' arguments and trial briefs that the redacted testimony was regarding alleged phone calls appellant's ex-girlfriend was receiving from Nancy O.⁵ The court ruled that appellant's "statements regarding comments his former girlfriend allegedly told him about Nancy [O.]a" were inadmissible under the hearsay rule and under Evidence Code section 352.

(ii) *Appellant's Testimony About Conflicts With Nancy O. Before Nancy O. Reported Appellant's Molestation of Adriana to the Police*

During trial appellant's counsel Alexander Patale attempted to ask appellant about his conflicts with Nancy O. before she reported Adriana's molestation to the police. The following colloquy took place:

"By Mr. Patale: Were there occasions when you had conflicts with Nancy prior to the end of February [2010]?"

"A Yeah. Almost at the end.

"Q What were these conflicts about?"

"Ms. Camaras [the prosecutor]: Objection. Relevance.

"Mr. Patale: I am not going to spend much time.

"The Court: At the moment, we are not going to spend any time. I am going to give the jurors a 15 minute recess, and we will resume at 25 after."

Subsequently, outside the presence of the jury, the court held an Evidence Code section 402 hearing regarding the conflicts between appellant and Nancy O. in February 2010. Appellant testified as follows:

⁵ In their trial brief, the People argued: "During his interview with Officer Madrigal, the defendant mentioned that Ms. [O.] was allegedly calling his ex-girlfriend for whom he works at Ralph's market. The defendant never heard any of the phone calls and speculated that Ms. [O.] was the person calling his ex-girlfriend, hanging up, and making statements to the ex-girlfriend such as, 'You're fat. Jose never liked you.' "

“By Mr. Patale: Mr. Galdamez, I am specifically asking you about if you had any arguments with Nancy [O.] starting on or about February 1st through the end of February on the 28th, where the issue of you moving out and leaving them on their own came up?”

“A. Yes. There was some conversations about it. She needs to get out of there.

“Q. I am talking about when you were living together.

“A. Jealous. I was with somebody else. I was more concerned about taking off before I left the house.

“Q. I am specifically talking about things that – perhaps an argument or a conflict –

“A. No.

“Q. -- that you had with –

“The Court: He has answered the question.”

Appellant’s counsel then asked appellant questions about a matter not at issue on appeal. The hearing ended without the trial court making an express ruling on whether appellant could testify about the nature of the conflicts between appellant and Nancy O. at the end of February 2010.

After the Evidence Code section 402 hearing, appellant was not asked any further questions about his conflicts with Nancy O. in February 2010.

c. *Standard of Review*

We review a trial court’s rulings excluding evidence under an abuse of discretion standard. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.) Further, in reviewing a judgment against a criminal defendant, “ ‘[w]e must indulge in every presumption to uphold a judgment, and it is defendant’s burden on appeal to affirmatively demonstrate error—it will not be presumed. [Citation.]’ ” (*People v. Tang* (1997) 54 Cal.App.4th 669, 677.) Finally, under Evidence Code section 354, a judgment cannot be reversed by reason of the trial court’s erroneous exclusion of evidence, unless the error resulted in a miscarriage of justice and it appears in the record that “(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made

compliance under subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination.”

d. *The Trial Court Did Not Abuse Its Discretion By Excluding Evidence of Appellant’s Statements Regarding His Ex-Girlfriend’s Alleged Statements*

As explained *ante*, we cannot ascertain from the record precisely what evidence was excluded in the redacted portions of pages 34 and 35 of the transcript of the recorded statement appellant gave to Officer Madrigal. Because appellant did not provide an adequate record, he did not meet his burden of affirmatively demonstrating the trial court erroneously excluded this evidence. (*People v. Green* (1979) 95 Cal.App.3d 991, 1001 [“error is never presumed, but must be affirmatively shown, and the burden is upon the appellant to present a record showing it”]; see also *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385 [it is appellant’s burden to provide an adequate record to permit review of a claimed error].)

Assuming arguendo that the transcript memorialized appellant’s statement that his ex-girlfriend told him Nancy O. was calling her, the trial court did not abuse its discretion in excluding this evidence. The statements were clearly inadmissible hearsay. (Evid. Code, § 1200.) On this basis alone, the trial court acted within its discretion.

In addition, the trial court did not abuse its discretion by excluding the statements redacted on the transcript pursuant to Evidence Code section 352. There was little or no probative value of the statements. This is because there was no evidence in the record that Nancy O. knew of any alleged reconciliation between appellant and his former girlfriend before she reported the molestation incident to the authorities. The statements thus appear to at most show that Nancy O. had an acrimonious relationship *with appellant’s former girlfriend*, which is hardly a strong motive to manipulate her seven-year-old daughter to go through the ordeal of falsely charging *appellant* with sexual

molestation.⁶ Conversely, the potential of unnecessarily consuming time, of confusing the jury and of unduly prejudicing the jury against Nancy O. was substantial. The trial court therefore also acted within its discretion to exclude this evidence pursuant to Evidence Code section 352.

e. *The Trial Court Did Not Abuse Its Discretion By Precluding Appellant From Testifying About Being Involved With Another Woman*

Appellant argues the trial court erroneously prohibited him from testifying about being involved with his former girlfriend before Nancy O. reported the alleged molestation incident to the authorities. The trial court, however, never issued a ruling specifically excluding such testimony. Indeed, appellant's counsel did not directly ask appellant whether he was involved with another woman and, if so, whether Nancy O. knew about it.

Rather, appellant's attorney asked appellant about the nature of his conflicts with Nancy O. in late February 2010. The trial court did not expressly rule on respondent's relevancy objection to this question but instead directed a short adjournment of the trial before appellant was permitted to answer. The trial court did so in order to conduct an Evidence Code section 402 hearing regarding the relevancy of the nature of the conflicts between appellant and Nancy O. in late February 2010.

At that hearing, after appellant stated he was "with someone else," appellant's counsel asked him whether he and Nancy O. had a conflict at the end of February 2010. Appellant stated that they did not have a conflict. After the hearing, appellant's counsel did not ask appellant any further questions about the issue. Counsel ostensibly assumed, based on appellant's testimony at the Evidence Code section 402 hearing, that appellant

⁶ Adriana underwent a nearly four-hour exam at a rape treatment center, was interviewed at length by a social worker and several police officers, and testified at the preliminary hearing and trial.

and Nancy O. did not discuss appellant's relationship with another woman before appellant left Nancy O.

The purported relevance of appellant's alleged reconciliation with his former girlfriend is that it provided Nancy O. with a motive to bring false charges against appellant and to cause her daughter to do the same. There was no evidence in the record, however, that Nancy O. knew about the alleged reconciliation before March 8, 2010—the day she reported the incident to the police. Appellant's alleged reconciliation with his former girlfriend thus had little or no relevance. Accordingly, the trial court's ruling to hold an Evidence Code section 402 hearing regarding the nature of conflicts between appellant and Nancy O. was not an abuse of discretion.

f. *The Trial Court Did Not Violate Appellant's Sixth Amendment Rights*

Appellant argues that the trial court's alleged erroneous exclusion of evidence violated his Sixth Amendment rights to confront witnesses and present a defense. He forfeited this argument, however, because he did not raise it in the trial court. (*People v. Vasquez* (2012) 205 Cal.App.4th 609, 628.) Even if it were not forfeited, the argument fails on the merits.

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy a number of rights, including the right "to be confronted with the witnesses against him" and the right "to have compulsory process for obtaining witnesses in his favor." (U.S. Const., 6th Amend.) We shall discuss these two rights separately.

The Confrontation Clause gives criminal defendants the right to confront the prosecution's witnesses physically and an opportunity to cross-examine such witnesses. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; *People v. King* (2010) 183 Cal.App.4th 1281, 1314.) Here, appellant does not claim he was denied the right to confront and cross-examine any of respondent's witnesses. He instead argues that the trial court precluded him from presenting his own testimony regarding Nancy O.'s alleged motives. But appellant was not a witness "against" himself and he cannot

“confront” and cross-examine himself. Thus under the plain text of the Sixth Amendment, the Confrontation Clause is not implicated. (U.S. Const., 6th Amend.)

Appellant’s argument that he was denied the right to present a defense is equally without merit. The application of ordinary rules of evidence does not infringe upon a criminal defendant’s rights to due process, including the right to present a defense. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) “ ‘Although completely excluding evidence of an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor subsidiary point does not impair an accused’s due process right to present a defense.’ ” (*Id.* at p. 428.) Here, the trial court permitted appellant to call any and all witnesses he wished. The trial court’s evidentiary rulings regarding appellant’s testimony on one topic—even if they were erroneous (they were not)—do not implicate appellant’s constitutional right to present a defense. (Cf. *id.* at p. 427 [“His attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive”].)

g. *Miscarriage of Justice and Offer of Proof*

Because we conclude that the trial court did not abuse its discretion by excluding evidence, we do not reach the issues of (1) whether the trial court’s evidentiary rulings resulted in a miscarriage of justice and (2) whether appellant made an adequate offer of proof or was excused from doing so because it would have been futile.

2. *Alleged Prosecutorial Misconduct*

In her closing argument, the deputy district attorney argued that Nancy O. was not motivated by money or jealousy.⁷ Appellant contends this argument constituted prosecutorial misconduct because it was “misleading and unfair.” He did not, however, make this argument in the trial court. Appellant thus forfeited the argument on appeal. (Cf. *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.)

⁷ The prosecutor argued: “What is motivating? The witnesses. Nancy [O.] told you there is no civil lawsuit pending. Nancy and her daughter are here because they are seeking justice. They are not looking for money. [¶] . . . [¶] Is Nancy [O.] that mother that’s got some vendetta with the defendant, and she is going to put her child up to that and put her child through that procedure in this criminal justice process?”

In any case, the argument lacks merit. Prosecutors are entitled to make “fair comment” on the evidence and witnesses. (*People v. Huggins* (2006) 38 Cal.4th 175, 207.) They “have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.” (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Nothing the prosecutor stated at closing argument in this case went beyond the wide latitude given to attorneys in her position. There was no prosecutorial misconduct.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J

. ALDRICH, J.